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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN JOINT PROTECTIVE BOARD,
BROTHERHOOD RAILWAY CARMEN DIVISION,
TRANSPORTATION COMMUNICATIONS UNION,

Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY
and BURLINGTON NORTHERN, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should §2, First (45 U.S.C. §152, First) of the Railway Labor Act which requires carriers to "exert every reasonable effort . . . to settle all disputes" be interpreted to impose a statutory duty upon a carrier to disclose to a railway labor union information which the union has requested the carrier to provide concerning labor disputes between the carrier and the union.

2. Does a railway labor union which has requested a carrier to provide information concerning labor disputes between the carrier and union have a cause of action, cognizable in the federal courts, for a carrier's violation of 45 U.S.C. §152, First based upon the carrier's failure and refusal to provide requested information to the union.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Burlington Northern Joint Protective Board, Brotherhood Railway Carmen Division, Transportation Communications Union (hereinafter "Union" or "Petitioner") requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered in this action on July 7, 1987.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Burlington Northern Joint Protective Board, Brotherhood Railway Carmen Division,

Transportation Communications Union,[1] Plaintiff-Petitioner and Burlington Northern Railroad Company and Burlington Northern, Inc., Defendants-Respondents.

OPINIONS BELOW

The order and judgment (unpublished) of the United States District Court for the Western District of Missouri appear in the Appendix at A-1. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 822 F.2d 810 and appears in the Appendix at A-8. The order of the United States Court of Appeals for the Eighth Circuit denying the Union's Petition for Rehearing En Banc appears in the Appendix at A-12.

CONCISE STATEMENT OF THIS COURT'S JURISDICTION

On August 7, 1986, the Union filed a four (4) count complaint in the United States District Court for the Western District of Missouri, Southern Division. In said complaint, the Union charged respondents with violations of §2, First and Second (45 U.S.C §152, First and Second) of the Railway Labor Act (hereinafter "RLA").[2] Counts I and II of the complaint

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[1] The plaintiff below was styled as Burlington Northern Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO-CLC. After this case was submitted to the Court of Appeals, the Brotherhood Railway Carmen merged with and became a division of the Transportation Communications Union (formerly BRAC). Petitioner's name, as set forth above, reflects the present name of the plaintiff below.

[2] Although not a issue herein, the Union also charged that respondents had violated 49 U.S.C. §11343, *et. seq.* and the *New York Dock* conditions imposed by the ICC in *Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Railway Company*, Finance Docket No. 28583 (sub. no. 1f) 360 ICC 966 (1980).

sought preliminary and permanent injunctive relief based upon — *inter alia* — respondents' alleged violations of §2, First and Second of the RLA. Count III sought permanent injunctive relief alleging, as a basis therefore, that the respondents had breached their statutory duties under §2, First and Second of the RLA by refusing to furnish the Union with information the Union had requested pertaining to labor disputes between Union and respondents. In Count IV the Union sought a declaration of its right to receive requested information from respondents pursuant to their statutory duties under §2, First and Second of the RLA. The Union asserted the district court had subject matter jurisdiction by virtue of 28 U.S.C. §§1331, 1336 and 1337.

On August 22, 1986, a hearing was held solely on the Union's request for preliminary injunctive relief in Counts I and II. By order and judgment dated September 4, 1986, the district court dismissed all four counts of the Union's complaint for "want of subject matter jurisdiction."

The Union's Notice of Appeal was filed on September 16, 1986. Subsequent to briefing and oral argument, a panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment dismissing the Union's complaint for want of subject matter jurisdiction on July 7, 1987.

The Union timely filed its Motion for Rehearing En Banc by the Eighth Circuit Court of Appeals on July 21, 1987. By order dated and entered on October 9, 1987, the Union's Motion for Rehearing En Banc was denied.[3]

This Petition for a Writ of Certiorari was filed within 90 days of the entry by the Eighth Circuit Court of Appeals of the order denying the Union's Motion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

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[3] By its October 9, 1987 order, the Eighth Circuit Court of Appeals also denied rehearing by the panel.

STATUTES INVOLVED

This case arises under the Railway Labor Act, specifically 45 U.S.C. §§152, First and Second (1982), which provide:

> **"General duties.**
>
> **First. Duty of carriers and employees to settle disputes.** It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> **Second. Consideration of disputes by representatives.** All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives, designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

STATEMENT OF THE CASE

Effective December 30, 1985, respondent Burlington Northern Railroad Company (hereinafter "BN") furloughed 67 of the 104 carmen employed at BN's Springfield, Missouri repair facility. (Complaint, Count III, ¶2, Answer to Count III, ¶2)[4] BN's seven day notice effecting said furloughs stated said furloughs were due to reduced business levels, reduced use of freight cars, and reduced shop programs. (Complaint, ¶2, Answer, ¶2) The furlough notice provided no further information. The furloughed carmen were represented by the Union. (Complaint, ¶2, Answer, ¶2, T. 9) This massive furlough caus-

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[4] All citations to Complaint or Answer refer to Count III unless indicated otherwise.

ed the Union to be concerned that the Springfield repair facility would be closed. (T. 60-61) As a result of this furlough and concerns over closing the Springfield repair facility, the Union requested a conference with BN officials. (Complaint, ¶6, Answer, ¶6) During said conference on January 17, 1986, the Union contended that the December 30 furlough was in anticipation of BN's closing the repair facility and that the 67 furloughed carmen were, therefore, entitled to income protective benefits.[5] (Complaint, ¶5, Answer, ¶5, T. 58) BN denied that it planned to close the Springfield repair facility and denied that the carmen had been furloughed in anticipation of closing the Springfield repair facility. Rather, BN asserted the 67 carmen had been furloughed because of a "decline in business" and that, therefore, the furloughed carmen were not entitled to income protective benefits of any type. (Complaint, ¶2, 7, Answer, ¶2, 7, T. 50)

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[5] Two types of income protective benefits were potentially available to the furloughed carmen. One type of benefits were those under the New York Dock Conditions. (See, Plaintiff's Exhibit 1, hereinafter "Pl.Ex."). In order to be entitled to such benefits the furloughed carmen must demonstrate that a "transaction" within the meaning of Section 1 of the Conditions would occur (i.e. that a facility closure related to a merger would occur) and that the carmen had been furloughed *"in anticipation"* of the transaction. The other type of potentially available benefits were those under Article I of the 1964 Mediation Agreement. (See, Pl.Ex. 3) In order to be entitled to benefits under this Agreement, the carmen must demonstrate that a listed operational change (i.e., closing or abandonment of a facility) would occur and that the carmen had been furloughed *"in anticipation"* of the operational change. The 1964 Mediation Agreement furthermore provides that it is not applicable to operational changes which are subject to ICC approval (e.g. "transactions"). Regardless of whether the closing of the repair facility was ultimately determined to be a "transaction" under New York Dock or an "operational change" under the 1964 Mediation Agreement, it was necessary for the carmen to establish that they had been furloughed *"in anticipation"* of the closing of the repair facility. Moreover, the facts needed to prove that the December 30 furlough was implemented in anticipation of the shop closing, rather than as a result of a decline in business, are the same regardless of whether the shop closing was ultimately determined to be a New York Dock transaction or an operational change under the 1964 Mediation Agreement.

As a consequence of the dispute, the Union filed claims on behalf of the furloughed carmen.[6] (Complaint, ¶4, Answer, ¶4) In addition, on March 19, 1986 the Union also requested by letter that BN furnish it with information calculated to disclose the reasons for the furlough of the 67 carmen and whether the carmen had been furloughed in anticipation of closing the Springfield repair facility — as the Union contended — or whether the carmen had been furloughed as a result of a "decline in business" as BN contended. (Complaint, ¶11, Answer, ¶11, Pl.Ex. 8) The Union, *inter alia,* requested studies that had already been performed concerning utilization of carmen at Springfield, freight car utilization, utilization of BN repair facilities, centralizing or concentrating freight car repair work, and closing the Springfield repair facility. (Pl.Ex. 8) The Union also requested data concerning the number of freight car repairs transferred from Springfield to other facilities, the number of freight cars BN leased from other companies and the number of private cars BN hauled. (Pl.Ex. 8) Even though the Union repeatedly renewed and reiterated its request for this information, BN refused to provide the requested information.[7] (Complaint, ¶s 12-14, Answer, ¶s 12-14, T. 24)

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[6] The Union filed the claims under the auspices of the New York Dock Conditions because BN had not advised whether the December 30 furloughs had been implemented under the authority of the New York Dock Conditions or the 1964 Mediation Agreement. Rather, BN contended the December 30 furloughs were due solely to a decline in business and that neither set of protective conditions were applicable.

[7] By letter dated August 14, 1986, after the complaint had been filed, BN did provide some of the other information the Union had requested concerning summaries of numbers of cars repaired, capital expenditures, car fleet size, number of cars in storage, average employment levels, and revenue ton miles. BN, however, has continued to refuse to provide any of the other information the Union had requested.

Thereafter, effective May 2, 1986, BN furloughed an additional 12 Springfield repair carmen. (Complaint, ¶3, Answer, ¶3) Ultimately, on May 14, 1986, BN posted a 90-day notice furloughing the remaining 25 Springfield repair shop carmen, closing the Springfield repair facility, and transferring the remaining 25 carmen positions and work to BN's Havelock Shop at Lincoln, Nebraska. (Complaint, Count I, ¶23, Count III, ¶1, Answer, Count I, ¶23, Count III, ¶1) In its notice, BN intentionally refrained from advising the Union of the authority (i.e., New York Dock Conditions or 1964 Mediation Agreement) under which it was closing the Springfield facility in order to prevent the Union from knowing BN's asserted authority for closing the facility and possibly objecting thereto. (T. 104)

Subsequent to BN's posting of the May 14 notice, Union and BN officials met on June 30, 1986. (T. 19) The Union contended that implementation of the May 14 notice was a New York Dock transaction. (T. 17) BN officials appeared at said meeting and reiterated their refusal to furnish the previously requested information. (Pl.Ex. 10, T. 24) BN also advised the Union that BN's closing of the Springfield repair facilty and transfer of positions and work from Springfield to Havelock, pursuant to BN's May 14 notice, was not a New York Dock transaction, but rather was only a change in operations covered by the 1964 Mediation Agreement. (T. 21, 83-84, 92) Although any carmen furloughed in anticipation of a change in operations under the 1964 Mediation Agreement would be entitled to protective benefits under that agreement (see, Pl.Ex. 3), the BN continues to insist that none of the 79 furloughed carmen were furloughed in anticipation of the change in operations. Rather, BN contends the 79 carmen were furloughed as a result of a decline in business, and therefore, are not entitled to any protective benefits.

As a consequence of the disagreement concerning whether BN's implementation of its May 14, 1986 notice constituted a New York Dock transaction, the Union — by letter dated July

2, 1986 — requested that this issue be arbitrated by a New York Dock Committee. (Pl.Ex. 10) On July 12, 1987, after the Union had requested arbitration — but prior to agreement between BN and the Union on the issue to be arbitrated — the Union requested further conferences concerning closure of the Springfield repair facility, furlough of carmen and transfer of the final 25 carmen and their work from Springfield to Havelock. (Pl.Ex. 10, T. 20, 34) Despite the Union's request, BN refused to schedule any meetings. (T. 20, 34)

On August 7, 1986 the instant complaint was filed. Hearings on the Union's request for preliminary injunctive relief under Counts I and II were conducted. Thereafter, the district court dismissed the Union's complaint — including the allegations in Count III that BN had violated ¶2, First and Second by refusing to provide the requested information (Complaint, ¶15) — for lack of subject matter jurisdiction. Thereafter, the Union and BN ultimately agreed upon the issue to be submitted to arbitration and on January 20, 1987 arbitrated the issue of whether BN's implementation of its May 14, 1986 Notice constituted a New York Dock transaction before a New York Dock committee.[8] The issue of whether BN violated its ¶2, First statutory duty "to exert every reasonable effort" during the mandatory ¶2, Second conference by refusing to provide requested information was, obviously, not submitted to nor decided during such arbitration. Nor could it have been submitted to a New York Dock Committee.

On May 20, 1987, the New York Dock Committee entered its award finding that BN's implementation of its May 14 notice was not a New York Dock transaction. The Committee,

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[8] The Union, on June 4, 1987, filed the New York Dock Committee award in the Eighth Circuit Court of Appeals pursuant to Federal Rules of Appellate Procedure, Rule 28(J). The award appears in the appendix hereto at A-12.

however, expressly did not address or pass judgment upon whether BN had furloughed the 79 carmen in anticipation of closing the Springfield repair facility. Moreover, the committee expressly did not address or consider the rights of the Springfield carmen under any other protective arrangement, specifically the 1964 Mediation Agreement.

Consequently, the issue of whether the 79 carmen furloughed effective December 30, 1985 and May 2, 1986 were furloughed in anticipation of closing the Springfield shop and their rights to protective benefits under the 1964 Mediation Agreement has not yet been resolved. The Union is currently pursuing claims upon their behalf under the 1964 Mediation Agreement. Moreover, the information which the Union requested on March 19, 1986 is relevant to the issue of whether said carmen were furloughed in anticipation of the closing of the Springfield repair facility and their right to protective benefits under the 1964 Mediation Agreement, and is needed by the Union for the handling of these still unresolved claims. Therefore, this Court's determination as to whether the BN breached its §2, First duty by refusing to provide the requested information is critical to the fate of these 79 carmen.

REASONS FOR GRANTING THE WRIT

I.

PRELIMINARY STATEMENT

This petition presents extremely significant questions of interpretation of the Railway Labor Act, 45 U.S.C. §151 et seq.: whether the statutory duty "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes, whether arising out of the application of agreements or otherwise . . .", §2, First of the RLA (45 U.C.S. §152, First), encompasses a duty on the part of the carrier to furnish to the union, upon request, information required by the union to carry out its statutory role as exclusive collective bargaining agent under the RLA, and whether that duty may be enforced in the federal courts. The statutory right of a union to request and receive such information and the corresponding statutory duty of the employer to furnish such information under the National Labor Relations Act (NLRA) has long been recognized by this Court and has long been routinely enforced by the NLRB and Courts of Appeals. As will be shown below, the Court has considered this duty to be essential to the proper functioning of federal labor law in industries covered by the NLRA. By contrast, however, the opinion the the Court of Appeals in the instant case holds that the federal courts, the only forums with jurisdiction to enforce the statutory commands of §2, First of the RLA, do not have jurisdiction to consider petitioner's claim that the carrier has a duty to furnish information needed by the union to administer and enforce existing agreements.[9] If allowed to stand, the decision of the Court of Appeals will mean that RLA carriers have no duty to furnish information to substantiate any

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[9] To petitioner's knowledge, the only other decision directly addressing this issue is *Pacific Fruit Express and Union Pacific Fruit Express Joint Protective Board v. Union Pacific Fruit Express Co.*, 826 F.2d 920 (9th Cir. 1987). In that case, the court also declined to require to the carrier to furnish the requested information.

factual claim made by them in dealing with the union, even though such disclosure has been deemed by this Court to be essential to the functioning of the system of industrial self government established by the NLRA. This will diminish the utility and effectiveness of the arbitration process for RLA unions and employees to the vanishing point in complex contract disputes especially when, as here, the information essential to resolving the dispute is exclusively within the possession of the carrier, and will contribute to the increase in fair representation/contract breach litigation in the federal courts. These are important issues which should be addressed by this Court. The resolution of these issues by the Court of Appeals is inconsistent with prior decisions of this Court. See Rule 17.1(c) of the Rules of the United States Supreme Court. The writ should be granted.

II.

§2, First Of The Railway Labor Act (45 U.S.C. §152, First) Imposes Upon A RLA Carrier The Duty To Furnish To RLA Unions, Upon Request, Information Required By The Union To Carry Out Its Statutory Duties As Exclusive Collective Bargaining Agent.

§2, First of the RLA (45 U.S.C. §152, First) imposes upon RLA carriers and unions alike the statutory duty "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of agreements or otherwise . . .".

In almost identical language, §204(a)(1) of the Labor Management Relations Act (LMRA) (29 U.S.C. §174(a)(1)), imposes upon employers and unions covered by the National Labor Relations Act the duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours and working conditions, . . .".

In construing the statutory language requiring NLRA employers and unions to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions," this Court, in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153-154, 76 S.Ct. 753, 755-56 (1956), held:

> "[2, 3] We think that in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreement would result. Section 204(a)(1) of the Act admonishes both employers and employees to **"exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions** * * *." In their effort to reach an agreement here both the union and the company treated the company's liability to pay increased wages as highly relevant.
>
> [4, 5] Good-faith bargaining necessarily requires that claims made by either bargainer should be **honest** claims. This is true about an asserted inability to pay an increase in wages. **If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.**

(Emphasis supplied). *Truitt,* of course, involved a plea of poverty made by the employer during negotiations for a collective bargaining agreement.

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565 (1967), this Court extended the *Truitt* case and held that the employer's statutory duty, upon request, to furnish information needed by the union to carry out its role as exclusive collective bargaining representative, included information sought by the union in connection with the enforcement and administration of

existing agreements through grievance and arbitration procedures. In *Acme,* this Court rejected the employer's claim that requiring the employer to furnish pertinent information would require the court to construe the collective bargaining agreement, thereby improperly infringing upon the jurisdiction of the arbitrator. This Court specifically held that enforcing the statutory duty to furnish information in the context of a dispute subject to arbitration was not only proper but "was in aid of the arbitral process," 385 U.S. at 483, 87 S.Ct. at 569, and *essential* to the proper functioning of arbitration. The duty to furnish information is extremely well established as to NLRA employers as one part of the employer's general duty to bargain in good faith, and there is a considerable body of case law involving the details of its application.

Petitioner's argument in this case is simple and straight forward. If the statutory command of §204(a)(1) of the LMRA, that NLRA employers and unions shall "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, . . ." means that NLRA employers, as part of their duty to bargain in good faith, have a statutory duty to furnish information requested by the union, as set forth above, then the virtually identical statutory command of §2, First of the RLA, that RLA carriers and unions shall "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" should be construed in a similar fashion, thereby imposing a similar duty upon RLA carriers to furnish pertinent information to the union required by the union to carry out its statutory duties as exclusive collective bargaining agent. Petitioner respectfully submits that when, as here, Congress has used virtually identical language in two different acts relating to labor relations, such identical language should be accorded similar construction by this Court in each act. There is no principled basis for doing otherwise. The court below certainly did not offer any principled reason for its refusal to do so. To the contrary, the Court of Appeals disposed of this claim in one paragraph, holding that it

had no jurisdiction to consider the claim and that, in any event, it would be inappropriate to order "discovery" with respect to a matter in binding arbitration, a position specifically rejected by this Court in *Acme*.

Indeed, in *Acme,* this Court held that enforcing the statutory duty to furnish information did not invade or infringe upon the jurisdiction of the arbitrator, but was in aid of arbitration and essential to its proper functioning.[10] The opinion of the court below offers no reason why that reasoning is not applicable to the instant case. Although there are minor procedural variations between arbitration under the RLA and under the NLRA, the essentials of the process remain the same. Arbitration is arbitration. If the duty to furnish relevant information is essential to the proper functioning of arbitration in the many and diverse industries covered by the NLRA, it is also essential in the rail industry under the RLA. The arbitrator cannot properly apply the agreement to a dispute unless the facts are adequately presented. In this case, a crucial factual issue for arbitration under the 1964 Mediation Agreement would be the reason for the furloughs of the 79 carmen and the validity of the carriers' claim that the furloughs were due to decline in business. As explained above, this issue remains open at this time.[11] The

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[10] In enforcing the duty to furnish information, the court would not interpret the agreement. To the contrary, it would refer to the agreement only to the extent necessary to determine whether the information requested was relevant, under a broad-discovery type standard, to the underlying dispute, the merits of which would be resolved by the arbitrator.

[11] Since an arbitration panel has decided that the carrier's actions here were not a "transaction" for purposes of the ICC's New York Dock Conditions and that the Conditions are not applicable in this case, cases holding that the ICC has primary jurisdiction when the parties are applying ICC protective conditions are not relevant or germane to this case. The union's continuing claims that the employees are entitled to benefits under the 1964 Mediation Agreement are governed entirely by the RLA.

economic data and other information pertinent to this issue which has been requested by the union is exclusively in the hands of the carrier. Arbitration does not serve its intended function under federal labor policy providing final resolution to industrial disputes when the information necessary to a resolution on the merits is exclusively in the hands of the carrier, and the carrier withholds access to that information. This is a simple reality which this Court has repeatedly recognized under the National Labor Relations Act. It should also be recognized under the Railway Labor Act.

Even apart from the foregoing, the position of the carrier that it has no duty whatsoever to furnish any information requested by the union cannot be accepted. The conduct of a carrier which makes a factual assertion to a union, which is self-serving from the viewpoint of the carrier's interests, followed by a steadfast refusal to comply with a union's request for underlying data which could be used to verify the validity of the carrier's assertion is, on its face, inconsistent with and contrary to the statutory command of §2, First to "exert every reasonable effort to make and maintain agreements . . ." Such conduct obviously falls very, very far short of "exerting every reasonable effort."

This Court must recognize that acceptance of the carrier's position that it can continue to suppress or withhold requested information relevant to the merits of a dispute such as the instant one condones, indeed entices and invites this carrier and other carriers to breach such agreements. If the union lacks access to information necessary to police and enforce its agreements and the carrier cannot be compelled to disclose the requested information, the carrier can violate agreements with little or no risk. Such a result is not consistent with the policies of the RLA and also subverts the dispute resolution procedures of the Act.

The Court should grant the writ to address these important issues.

III.

The Federal Courts Have Subject Matter Jurisdiction To Enforce The Duty To Furnish Information Under §2, First Of The Railway Labor Act.

The most extraordinary aspect of the opinion of the court below is its holding that it lacks subject matter jurisdiction to even consider petitioner's statutory claim. It is most respectfully submitted that this holding is directly contrary to this Court's decision in *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 577-582, 91 S.Ct. 1731, 1734-1737 (1971). In that case, this Court explicitly held that §2, First of the RLA imposed legal obligations, and was not merely a statement of "policy" and stated:

> "We think it plain that Section 2, First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." 402 U.S. at 578, 91 S.Ct. at 1735.

This Court also squarely held that the federal courts were to be the means by which the duties of §2, First would be enforced, holding:

> "In light of these considerations, we think the conclusion inescapable that Congress intended the enforcement of Section 2, First to be overseen by appropriate judicial means rather [than by the mediation board]." Id at 582, 91 S.Ct. at 1737 (bracketed material and emphasis supplied).

This Court has also stated that §2, First is the "heart" of the Railway Labor Act. *Brotherhood Railway Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 378-799, 89 S.Ct. 1109, 1115 (1969).

This Court has also clearly held that the statutory duties imposed by §2, First apply generally to all disputes between carriers and unions under the RLA, both those characterized as "major" (dealing with the formation or attempts to form collective bargaining agreements) and those characterized as "minor" (dealing with application and interpretation of those agreements and therefore subject to arbitration before appropriate adjustment boards or public law boards). *Elgin J. & E. Ry. Co. v. Burley,* 325, 711, 729, 65 S.Ct. 1282, 1293 (1945).

In *Chicago & Northwestern, supra* this Court explicitly held, relying in part on legislative history (See 402 U.S. at 576-578, 91 S.Ct. 1731, 1735; Hearings on Railroad Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 40-41, 66, 84-85, 91 (1926)), that the specific content of the duties imposed by §2, First was to be developed and enforced by the federal courts in a common law, case by case fashion. The RLA, unlike the NLRA, did not create an administrative agency, such as the NLRB, to enforce the substantive rights and duties of the parties as set forth by Congress in its legislation. The responsiblity for enforcing the statutory command of the RLA was given to the courts by the Congress. If the courts deny this responsibility, the statutory duties imposed by §2, First will be without meaning, for lack of any forum in which they can be enforced. The various Adjustment Boards created by the RLA (See §3 of the RLA, 45 U.S.C. §153) are empowered only to interpret and apply agreements, and their jurisdiction does not extend to interpretation of the enactments of Congress. *C.f., Alexander v. Gardner Denver Co.,* 415 U.S. 36, 53-55, 94 S.Ct. 1011, 1022 (1974) (arbitration decision based on arbitrator's view of requirements of enacted legislation rather than interpretation of agreement exceeds scope of submission and will not be enforced).

Petitioner's statutory claim in this case is thus within the jurisdiction of the federal courts because the duty to furnish information is a substantive matter governed by the RLA — and

the existence of and enforcement of that duty cannot be resolved by interpretation of a collective bargaining agreement. *Railroad Trainmen v. Howard,* 343 U.S. 768, 774, 72 S.Ct. 1022, 1025 (1951); *Steele v. Louisville N. & R. Co.,* 323 U.S. 192, 65 S.Ct. 226 (1944); *Railway Labor Executives' Assoc. v. Boston & Maine Corp.,* 808 F.2d 150 (1st Cir. 1986). Only the federal courts can interpret and enforce §2, First.

The holding of the Court of Appeals that it had no jurisdiction to consider petitioner's claims of violation of Section 2, First of the RLA is directly contrary to this Court's holding in *Chicago & Northwestern, supra.* It is most respectfully submitted that the tenor of the opinion implies that the court below may have been more focused on an institutional concern than on the question of jurisdiction as such. The institutional concern, not alluded to specifically in the opinion, is that imposing such a duty upon RLA carriers might increase the case load of the federal courts. This concern is unfounded. The Courts of Appeals routinely consider such questions on petitions for review from decisions of the National Labor Relations Board. Additionally, in the RLA context, once the duty is established, such disputes could be routinely and expeditiously resolved by magistrates, just as many discovery disputes are now resolved. See fn. 10, p. 14, supra. Extensive involvement by district court judges would not be required in any respect. Further, to deny the union access to relevant information in cases such as the instant case, when numerous employees have literally lost their jobs, will inevitably increase the incidence of major hybrid fair representation/contract breach litigation by employees whose claims were either not presented by the union to arbitration due to lack of proof, or were denied by arbitrators due to lack of proof. The federal courts unhesitatingly accept jurisdiction of these fair representation/contract breach cases, although they clearly involve the very merits of matters subject to binding arbitration, based on the statutory duty of fair representation recognized by this Court under both the RLA and the NLRA. Anomalous situations will arise in such litigation because,

ironically, the aggrieved employees will then have available the full panoply of discovery procedures under the Federal Rules of Civil Procedure to employ against both carrier and union. If the decision of the court below stands, evidence will be discovered and presented to juries in fair representation/contract breach suits to which the union was denied access in arbitration. If such evidence demonstrates the employer has breached the contract, will courts or juries follow the impulse to do justice to the individual employees by holding the employer liable? If so, courts and juries can do so only by also finding against the union to which the Court of Appeals opinion would deny relevant information, since this Court has held that *both* the claim of breach of duty of fair representation against the union and the claim of contract breach against the employer must be proved before the employee will be entitled to recover as against either. See *Hines v. Anchor Motor Freight Company,* 424 U.S. 554 (1976). It would obviously be improper to hold the union liable for failure to obtain or present information to which the courts denied it access. This means that cases will arise in which contract breaches by employers will be clearly revealed by discovery in such suits, but in which the employees will have no remedy against the employer because the union cannot be held liable in that it could not obtain in the grievance and arbitration process the same evidence obtained by the employees in the discovery process. It is most respectfully urged that this is not the way to promote arbitration as a method of final expeditious resolution of industrial disputes in the railway industry. This Court should grant certiorari and reverse the judgment of the Court of Appeals.

CONCLUSION

Accordingly, petitioner respectfully submits that this Court should grant certiorari in this case because the opinion of the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, that is the question of whether an enforceable duty to furnish relevant information exists under Section 2, First of the Railway Labor Act. This question has also been decided by the Court of Appeals in a way which conflicts with prior decisions of this Court, including notably *Chicago & Northwestern Railway Co. v. United Transportation Union,* 402 U.S. 570, 91 S.Ct. 1731 (1971); *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S.Ct. 753 (1956); and *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 87 S.Ct. 565 (1967). See Rule 17.1(c) of the Rules of the United States Supreme Court. For these reasons, it is most respectfully urged that the Court grant petitioner a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

Case Number: 86-3458-CV-S-4

Burlington Northern Joint Protective Board, Brotherhood Railway Carmen of The United States and Canada, AFL-CIO-CLC,

Plaintiff,

v.

Burlington Northern Railroad Company, et al.,

Defendants.

Decision by Court. This action came to a determination before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Counts I, II, and III and IV of the complaint are dismissed for want of subject matter jurisdiction; and it is further

ORDERED that the defendant's motions to strike plaintiff's request for production, for a protective order, to quash subpoena for documents, and to strike verification of plaintiff's complaint are denied as being moot. Costs shall be assessed against the plaintiff.

Date: September 4, 1986 Clerk: R. F. CONNOR

(By) Deputy Clerk: Nancy Crighton

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 86-3458-CV-S-4

Burlington Northern Joint Protective
Board, Brotherhood Railway Carmen
of the United States and Canada,
AFL-CIO-CLC,
Plaintiff,

v.

Burlington Northern Railroad
Company, et al.,
Defendants.

ORDER

On August 7, 1986, plaintiff filed a four count complaint requesting a preliminary injunction (Counts I and II), a court order compelling the defendant to furnish information requested by the plaintiff (Count III), and a declaratory judgment (Count IV). A hearing on plaintiff's application for a preliminary injunction was conducted on August 22, 1986. The Court will deny plaintiff's application for injunctive relief and dismiss Counts I and II of the complaint for want of subject matter jurisdiction. On August 19, 1986, defendant filed a motion to dismiss Count III for lack of subject matter jurisdiction and a motion to strike plaintiff's requests for production and/or a protective order. Defendant's motion to dismiss Count III will be granted and defendant's motion to strike and/or a protective order will be denied as being moot. On August 20, 1986, defendant filed a motion to quash subpoena for documents and a motion to strike verification of plaintiff's complaint. Both motions will be denied as being moot. Finally, defendant requested in its August 20, 1986 answer that the Court dismiss Count IV of the complaint for want of subject matter jurisdiction. Count IV will be dismissed.

Application for Preliminary Injunction

Counts I and II of the complaint request the Court to enjoin the defendant from abolishing the positions of 25 carmen and transferring their work from defendant's Springfield, Missouri repair facility to the defendant's Havelock, Nebraska facility until the defendant has complied with Section 4 of the protective conditions set forth in *New York Dock-Railway-Control-Brooklyn Eastern District,* 360 ICC 60 (1979). The defendant maintains that the *New York Dock* conditions are not applicable in this case.

Section 4 of the *New York Dock* provisions only applies if the defendant is contemplating a "transaction" which "may cause the dismissal or displacement of any employee, or rearrangement of forces, . . ." "Transaction" is defined in Section 1(a) of the *New York Dock* conditions as "any action taken pursuant to authorization of the Commission on which these provisions have been imposed." The issue presented for resolution is whether this Court has jurisdiction to decide if defendant's abolition of the 25 Springfield, Missouri carmen positions and transfer of work to Havelock, Nebraska was a "transaction" under the *New York Dock* conditions. This would require a factual determination of whether the merger caused the loss of the Springfield carmen positions and transfer of work.

Section 11 of the *New York Dock* conditions provides for the arbitration of disputes regarding the interpretation, application, or enforcement of its provisions. Section 11(a) reads:

> In the event a railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 30 days after the dispute arises, it may be referred by either party to an arbitration committee.

Plaintiff has invoked arbitration under section 11(a) to determine if the defendant's action is a "transaction." Whether an act or omission of a railroad constitutes a "transaction" per the definitional section 1(a) is clearly a proper subject for arbitration under section 11(a) of the *New York Dock* conditions. Furthermore, the decision of the arbitration committee shall be final and binding. Section 11(c), *New York Dock* conditions.

Most importantly, the arbitration remedy deprives the Court of jurisdiction over plaintiff's claims under the *New York Dock* conditions. *Sorensen v. Chicago and Northwestern Transportation Company,* 627 F.2d 136 (8th Cir. 1980); *Walsh v. United States,* 723 F.2d 570 (7th Cir. 1983). In *Sorensen,* employees of defendant railroad filed suit in federal district court against defendant for breach of a protective agreement between the employees' union and defendant. The plaintiffs had invoked arbitration of the same issue under article 14 of the protective agreement which provided for final and binding arbitration of disputes arising under provisions of the agreement. The arbitration committee had made an award and the district court granted defendant's motion for summary judgment. *Sorensen v. Chicago and Northwestern Transportation Company,* 627 F.2d at 137. On appeal, the Eighth Circuit affirmed the judgment of the district court, holding that the district court was without jurisdiction to entertain the cause of action since the dispute was subject to final and binding arbitration. *Id.* at 138.

Similarly, in *Walsh v. United States,* an employee sought review of a decision of the Interstate Commerce Commission which dismissed his complaint alleging violation of protective conditions for want of subject matter jurisdiction. The Seventh Circuit affirmed this dismissal, concluding that *New York Dock* conditions impose mandatory arbitration for petitioner's disputes which require "a factual determination of whether or not a rate bureau employee's dismissal was caused by the ICC's deregulation of a rate bureau industry." *Walsh v. United States,* 723 F.2d 570, 574 (7th Cir. 1983).

Sorensen v. Chicago and Northwestern Transportation Company and *Walsh v. United States* were recently relied upon in *McKeon v. Toledo, Peoria and Western Railroad Company,* 595 F.Supp. 766 (C.D. Ill. 1984), a case similar to the present one. In *McKeon,* the plaintiff sued the defendant railroad alleging violation of the *New York Dock* conditions. Defendant maintained that the *New York Dock* conditions were inapplicable because its act was not a "transaction" under section 1(a). The district court, citing *Sorensen* and *Walsh,* dismissed the case for want of subject matter jurisdiction holding that the arbitration remedy provided in section 11(a) of the *New York Dock* conditions is mandatory and exclusive. *McKeon v. Toledo, Peoria and Western Railroad Company,* 595 F.Supp. at 770-771.

These holdings are in line with strong federal policy which favors arbitration of labor disputes whether mandated by statute or by agreements. *Gateway Coal Co. v. United Mine Workers of America,* 414 U.S. 368, 381-82, 94 S.Ct. 629, 638-39, 38 L.Ed.2d 583 (1974).

For the reasons stated, the Court will deny plaintiff's application for preliminary injunction and dismiss Counts I and II of the complaint for want of subject matter jurisdiction.

Motion to Dismiss Count III

In Count III of the complaint plaintiff asks the Court to order the defendant to furnish information regarding the furlough of 67 carmen and carmen painters effective December 31, 1985. Defendant maintains that the December 31, 1985 furlough was not a "transaction" under the *New York Dock* conditions. Plaintiff invoked arbitration of this dispute per section 11(a) on January 22, 1986. For the reasons set forth in the Court's dismissal of plaintiff's application for a preliminary injunction, the Court also lacks subject matter jurisdiction over the dispute concerning the December 31, 1985 furlough. Moreover, the Court has no jurisdiction to grant discovery concerning factual

issues over which it lacks subject matter jurisdiction. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Therefore, the Court will grant defendant's motion to dismiss Count III of the complaint for want of subject matter jurisdiction.

Based on the above determination, the following motions will be denied as being moot because they relate to the same information requested in Count III of the complaint: (1) defendant's August 19, 1986 motion to strike plaintiff's request for production; (2) defendant's August 19, 1986 motion for a protective order; and (3) defendant's August 20, 1986 motion to quash subpoena for documents.

Defendant's Request to Dismiss Count IV

Count IV of the complaint requests that the Court enter a declaratory judgment stating: (1) defendant's abolition of 25 carmen positions and transfer of their work from defendant's Springfield, Missouri repair facility is a "transaction" under the *New York Dock* conditions; and that (2) defendant shall comply with plaintiff's requests for information concerning the present labor dispute.

As previously explained in this order, the Court lacks jurisdiction to determine whether defendant's action constitutes a "transaction" under the *New York Dock* conditions. Similarly, the Court is without jurisdiction to grant discovery concerning factual matters over which it lacks subject matter jurisdiction. Therefore, the Court will dismiss Count IV of the complaint for want of subject matter jurisdiction.

For the reasons stated herein, it is hereby

ORDERED that Counts I, II, III and IV of the complaint are dismissed for want of subject matter jurisdiction; and it is further

ORDERED that the defendant's motions to strike plaintiff's request for production, for a protective order, to quash subpoena for documents, and to strike verification of plaintiff's complaint are denied as being moot. Costs shall be assessed against the plaintiff.

/s/ Russell G. Clark, District Judge
United States District Court

Dated: September 4, 1986

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2170

Burlington Northern Joint Protective Board,
Brotherhood Railway Carmen of the United
States and Canada, AFL-CIO-CLC
Appellant,

v.

Burlington Northern Railroad Company, et al.
Appellees.

On Appeal from the United States District Court
for the Western District of Missouri.

Submitted: April 17, 1987

Filed: July 7, 1987

Before LAY, Chief Judge, and WOLLMAN, Circuit Judge, and BOGUE,* Senior District Judge.

BOGUE, District Judge.

Burlington Northern Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada, AFL-CLC

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* The Hon. Andrew W. Bogue, Senior United States District Judge for the District of South Dakota, sitting by designation.

(hereinafter BRC) appeals from the district court's denial of its request for injunctive relief as well as from the district court's dismissal of its complaint. BRC predicates its claims that the district court erred on several bases. After carefully considering the record and briefs, we affirm.

The facts giving rise to the instant controversy are briefly as follows. On May 14, 1986, Burlington Northern Railroad Company and Burlington Northern, Inc. (hereinafter BN) notified all employees, as well as the general chairmen of the employees' respective labor organizations, of the transfer of certain freight car repair work from a shop in Missouri to a shop in Nebraska, the elimination of the carmen's positions at the Missouri shop and the establishment of those positions at the Nebraska shop. Various communications between the parties followed concerning, amongst other things, the correct characterization of the transfer, i.e., whether or not it constituted a transaction subject to the *New York Dock* protective conditions[1] of the Interstate Commerce Commission's order in *Burlington Northern, Inc. Control and Merger-St. Louis-SanFrancisco Railway Company,* Finance Docket No. 28583, 360 I.C.C. 788 (1980). At a June 30, 1986 meeting and by a letter dated July 2, 1986, BRC invoked arbitration under the *New York Dock* provisions. BN has maintained from the outset that the relevant closure and transfer of work were operational changes which could be instituted after ninety days notice in accordance with the Mediation Agreement, a collectively bargained agreement under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* BRC continues to maintain that the business decisions are "transactions" entitled to *New York Dock* protections.

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[1] The term New York Dock conditions originates from the case entitled *New York Dock Railway-Control-Brooklyn Eastern District* 360 ICC 60 (1979) in which the ICC set forth employee protective conditions appropriate in certain rail transactions for which approval is sought pursuant to 49 U.S.C. 11343 *et seq.*

After BRC had instituted arbitration proceedings, it then commenced the instant action in federal district court. Essentially, in counts I and II of Plaintiff's complaint, BRC sought to enjoin the defendant from abolishing the positions of 25 carmen and transferring their work from one facility to another until the defendant had complied with Section 4 of the protective conditions set forth in *New York Dock*.

The district court determined that it lacked subject matter jurisdiction to decide the dispute because the plaintiff had already elected to submit the controversy to binding arbitration for resolution. Section 11 of the *New York Dock* conditions provides that:

> In the event a railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 30 days after the dispute arises, it may be referred by either party to an arbitration committee.

The district court reasoned that the controversy before it involved an interpretation of the meaning of the word "transaction" which is defined in Section 1(a) of the *New York Dock* conditions. Therefore, in accordance with Section 11 of the conditions, the dispute had appropriately been submitted to arbitration. The district court also concluded that the submission of the dispute to arbitration deprived it of subject matter jurisdiction. We agree with this conclusion. *See Sorenson v. Chicago and Northwestern Transportation Company*, 627 F.2d 136, (8th Cir. 1980).

The third count of Plaintiff's complaint seeks discovery of certain factual information pertaining to the controversy at issue. Because this Court has determined that the relevant dispute was appropriately submitted to final and binding arbitration, we agree with the district court that, under the facts

and circumstances of this case, the ordering of discovery which, in essence, pertains to a matter in binding arbitration would be inappropriate.

Accordingly, we affirm the district court's order denying plaintiff's request for injunctive relief, dismissing plaintiff's complaint and denying plaintiff's request for discovery.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2170-WM

Burlington Northern Joint Protective Board,
Brotherhood Railway Carmen of the
United States and Canada, AFL-CIO-CLC
Appellant,

vs.

Burlington Northern, R.R. Co.,
Burlington Northern, Inc.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 9, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between

Brotherhood Railway Carmen of the
United States and Canada,
Organization,
and
Burlington Northern Railroad Company,
Carrier.

Pursuant to Article I, Section 11
of the New York Dock Conditions

I.C.C. Finance Docket
No. 28583

Case No. 1
Award No. 1

OPINION AND AWARD

Hearing Date: January 20, 1987
Hearing Location: St. Paul, Minnesota
Date of Award: May 20, 1987

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carrier Member: J. N. Locklin
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is the closing of the Springfield Car Shop and the transfer of work and employees, from Springfield to Havelock Shops, in accordance with the Carrier's notice dated May 14, 1986, a transaction under the "New York Dock Conditions," imposed in connection with the Burlington Northern-Frisco Merger?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In 1980, the Interstate Commerce Commission (ICC) approved the merger of the St. Louis-San Francisco Railway (Frisco) into the Burlington Northern Railroad Company. [ICC Finance Docket No. 28583; 360 I.C.C. 784] To compensate and protect employees adversely affected by the merger, the ICC imposed the employee merger protective conditions set forth in *New*

York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States,* 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the merged Carrier pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347. The merger was consummated on November 21, 1980.

At the Arbitrator's request, the parties waived the Section 11(c) limitation period for issuing this decision.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

On May 14, 1986, the Carrier notified the Organization that it intended to transfer all freight car heavy repair work at the Springfield, Missouri Consolidated Car Shop to Havelock, Nebraska on or about August 15, 1986. The Springfield facility was the only back shop on the former Frisco Railroad. Havelock is a point on the pre-merger Burlington Northern Railroad. To accomplish the transfer, the Carrier contemplated abolishing the remaining 23 carman and two carman painter positions at Springfield and to simultaneously establish the same number of carman and carman painter jobs at Havelock. Although the notice was silent, the Carrier informed the Organization at a June 30, 1986 conference that the notice was issued under the auspices of the September 25, 1964 Agreement as opposed to Section 4 of the New York Dock Conditions.

Because the Organization characterized the transfer of work from Springfield to Havelock as a New York Dock transaction, the Organization petitioned the United States District Court to enjoin the work transfer until the Carrier served a notice satisfying Section 4 of the New York Dock Conditions and either negotiated or arbitrated a New York Dock implementing agree-

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[1] All the sections relevant to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the appropriate section number.

ment. *Burlington Northern Joint Protective Board v. Burlington Northern Railroad Company,* Civ. No. 86-3458-CV-S-4 (W.D. Mo. 1986). On September 4, 1986, the Court dismissed the Organization's action for want of subject matter jurisdiction. The Court observed that the basic factual issue before it was whether the work transfer constituted a New York Dock transaction. The Court ruled that final and binding arbitration pursuant to Section 11 of the New York Dock Conditions was the mandatory and exclusive forum for determining if the Carrier had engaged in any activity within the definition of a transaction as set forth in Section 1(a) of the New York Dock Conditions. Thus, the parties progressed the issue to this Committee.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

From the Organization's perspective, manpower adjustments which occurred during the six-month period preceding the May 14, 1986 notice are relevant to demonstrating the Carrier's motive to systematically reduce forces at Springfield in anticipation of closing the shop. Specifically, the Carrier furloughed 67 Springfield carmen on December 30, 1985 and 12 additional carmen on May 2, 1986. The Organization charges that the Carrier furloughed these workers to limit its liability for the imminent shop closure.

If the 1980 merger had not occurred, Frisco rolling stock would have continued to be repaired at Springfield, the only major repair facility on the former Frisco territory. Absent the merger, the Carrier would be unable to transfer the heavy car repair work from a former Frisco point to a Burlington Northern repair facility. Obviously, the transfer arose as a direct result of the 1980 merger.

The New York Dock Conditions do not contain any time limitation. Thus, employees affected by a transaction are entitl-

ed to protective benefits even if the transaction is implemented long after the actual merger. This Committee lacks the authority to read an express or implied time limit into the New York Dock Conditions.

The Carrier, not surprisingly, labels the work transfer an operational change (instead of a transaction) simply because the benefits under the September 25, 1964 Agreement are inferior to the protective entitlements flowing from the New York Dock Conditions. However, Section 3 of the New York Dock Conditions recognizes that employees might be covered by more than one protective arrangement. Pursuant to Section 3, the employees and not the Carrier have the right to select whether they want benefits under the September 25, 1964 Agreement or the New York Dock Conditions. Therefore, even if the transfer of work was an operational change as defined by the September 25, 1964 Agreement, coverage of the 1964 Agreement does not preclude application of the New York Dock Conditions.

Since the transfer of work constituted a New York Dock transaction, the Carrier's May 14, 1986 notice was invalid.

B. The Carrier's Position

The transfer of work plainly and exclusively falls within the purview of the September 25, 1964 Agreement. The Organization has failed to show a proximate nexus between the 1980 merger and the 1986 transfer of work from Springfield to Havelock. Instead, the Organization misplaces its reliance on the "but for" argument. However, not every post-merger change is necessarily connected to the merger. The transfer was accomplished six years after the merger. It was simply a change in operation conducted within the normal course of business and completely unrelated to the merger.

The Carrier vigorously denies that it furloughed workers in anticipation of closing the Springfield shop. The May 2, 1986 furlough was directly attributed to the cancellation of a special

program to retrofit a hundred air slide cars for an important shipper. In addition, both the December, 1985 layoffs and the transfer of work were caused by factors factors wholly unrelated to the merger. The other factors were a decrease in available work, a decline in business volume, reduced capital expenditures and a reduction in the size of the Carrier's car fleet. More specifically, the number of cars repaired in shop programs decreased from 6,235 in 1983 to 3,326 (an estimate) in 1986. The Carrier's car fleet decreased by 44,000 in the last five years. Since deregulation, there has been an increase in non-Railroad-owned freight cars and those Carrier cars in service are newer. Newer cars require fewer repairs. Finally, the Springfield Region experienced a more severe business loss than the rest of the system. The amount of work dissipated to such a low level that the Carrier could not justify retaining the 25 carmen at the Springfield shop. In summary, economic conditions caused a reduction in repair work with the commensurate decrease in Springfield car forces.

IV. DISCUSSION

Section 11(e) of the New York Dock Conditions sets forth the Organization's burden of going forward and the Carrier's burden of proof. As the moving party, the Organization must identify a Section 1(a) transaction and specify ". . . pertinent facts of that transaction relied upon." The Carrier's burden of proof is conditional. If the Organization first fulfills its burden of going forward, then the Carrier assumes the burden of proving "...that factors other than a transaction affected the employee." On the other hand, if the Organization fails to either identify a transaction or state pertinent facts linking the transaction to an adverse effect suffered by the Springfield carmen, the Carrier prevails regardless of whether or not it has satisfied its burden of proof.

The gravamen of this dispute is whether the transfer of freight car heavy repair work from Springfield to Havelock was a Sec-

tion 1(a) transaction. Section 1(a) provides that a transaction is: "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." While the effects of a railroad merger might be felt long after the merger is actually consummated, not every employment adversity occurring subsequent to a merger presumptively entitles workers to the comprehensive protective benefits contained in the New York Dock Conditions. Conversely, the mere passage of time does not conclusively mean that a transfer of work is wholly remote from a much earlier merger. Each post-merger employment change must be evaluated on a case by case basis. Nonetheless, since six years elapsed between the Frisco merger and the transfer of work herein, it becomes more difficult for the Organization to show a rational relation between the change in operations and the merger. *BRC v. BN,* NYD § 11 Arb. Award No. 4 (Vernon, 1/3/86). A federal court recently ruled that the time interval between the merger and employment status change is of some significance when analyzing the underlying cause of railroad employee layoffs. *Mees v. Burlington Northern Railroad Company,* Civ. No. 86C0461 (N.D. Ill. 1986).

In this particular case, the Organization has failed to present pertinent facts to overcome the lapse of time between the 1980 merger and the 1986 transfer of work from Springfield to Havelock. Instead of developing relevant facts showing a coherent connection between the transfer of work and the merger, the Organization relies exclusively on the "but for" argument. Adopting the Organization's "but for" contentions would be tantamount to ruling that every Carrier activity initiated subsequent to the merger was *per se* related to the merger. *ATDA v. MP,* NYD §11 Arb. (Zumas, 7/31/81). Such a finding would effectively nullify the Organization's burden of going forward. *MP v. BRC,* NYD § 11 Arb. (Sickles, 7/30/82). This Committee is unable to construe the work transfer as a transaction within the definition of Section 1(a) of the New York Dock Conditions solely on the basis of the vague "but for" contention. Public Law Board No. 3764, Award No. 2 (Vernon).

Inasmuch as the Organization has failed to satisfy its burden of going forward, this Committee need not address or consider the rights of Springfield carmen under any other protective arrangement including the September 25, 1964 Agreement. Most importantly, we need not address or pass judgment on the Organization's allegation that the Carrier furloughed workers in anticipation of closing the Springfield Shop. Finally, our decision is confined to the peculiar facts and evidence in this record.

AWARD AND ORDER

The answer to the Question at Issue is "No."

Dated: May 20, 1987

/s/ R. P. Wojtowicz, Dissenting
Employees' Member

J. N. Locklin
Carrier Member

/s/ John B. LaRocco
Neutral Member